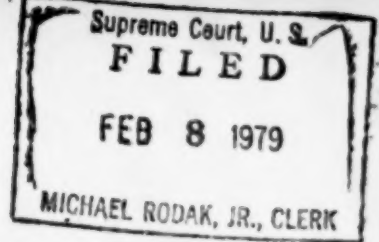


78-1234



In The
Supreme Court of the United States
October Term 1978

No.

DAVID H. GUST,

Petitioner,

vs.

NEIL CRAMER,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

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January 1979

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BRIEF FOR PETITIONER

Petitioner, David H. Gust respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Second Circuit which decision was entered on December 12, 1978.

Opinion Below

The decision of the United States Court of Appeals affirmed the decision of the United States District Court to dismiss the suit for failure to state a cause of action for which relief could be granted.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S. Code Section 1254.

Questions Presented

I Whether the claim of the Fifth Amendment privilege against compulsory self-incrimination, subsequently held to be invalid, leaves the claimant vulnerable to prosecution under a statute requiring information against which the claim was initially made.

II Whether the Federal Court erred in failing to reach the contention that invoking the Fifth Amendment Privilege was the basis for a penalty being imposed against the claimant of said privilege.

Statement of Facts

The petitioner was stopped by the police, identified himself, and invoked the privilege against compulsory self-incrimination. For failing to provide additional information, the petitioner was charged with being unlicensed, 509-1, and failure to comply with the lawful order of a police officer 1102 of the New York State Vehicle and Traffic Law.

At the trial the license in question was presented to the Court, and the charge of violating 509-1 was dismissed. However, the petitioner was punished with a \$25.00 fine for failing to provide information to the police.

Statement of Case

Federal jurisdiction was initially invoked under Title 28 U.S.C. Section 1343 & Article 3 section 2 & Article 6 section 2 of the U.S. Constitution.

ARGUMENT I

The requirements of due process must accommodate the great mandate of the privilege against compulsory self-incrimination. This Court in *Garrity v. New Jersey*, 385 U.S. 493, *Spevack v. Klein*, 385 U.S. 511, *Gardner v. Broderick*, 292 U.S. 273, and *Uniformed Sanitation Assn. et al v. Commissioner of Sanitation*, 392 U.S. 280, made it very clear that a witness must not be subjected to the choice of surrendering their Constitutional privilege against compulsory self-incrimination or a costly alternative.

The case at bar is framed by the dialogue taken from the transcript of the trial.

MR. PILATO: Section 1102, no person shall fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic.

MR. GUST: He testified I stopped properly.

THE COURT: You didn't do what he asked you to do. He asked for your license and registration and you failed to comply.

MR. GUST: I believe I was justified in that failure.

THE COURT: I don't.

MR. GUST: Then I have to submit to the discretion of the Court.

Assuming the respondent's brief statement "I don't" constitutes denying the validity of the claim, there is no indication that the claim had been made in bad faith. Nevertheless, a penalty was imposed for asserting the privilege in lieu of providing information to the police.

In *Miranda v. Arizona*, 384 U.S. 436 1966, this Court clearly rejected the use of coerced confessions. To find the petitioner subject to a penalty for invoking the privilege while in the

control of the police appears contrary to the intent of this Court as handed down in the provisions of *Miranda* supra.

In *Garner v. U.S.*, 424 U.S. 648 Mr. Justice Marshall and Mr. Justice Brennan in concurring judgment stated that a good faith erroneous claim of the privilege entitles a taxpayer to acquittal under section 7203. Although many taxpayers make disclosures on what are generally considered only civil matters, this Court recognized the application of the assertion of the privilege in this generally non-criminal area.

Applying this same reasoning to another generally non-criminal area, the claimant of the privilege should not be subject to a penalty or sanction for claiming what the law allows.

ARGUMENT II

The issue raised herein is more than reviewing the decision of a State Court. It is the contention that the conviction of section 1102 of the New York State Vehicle and Traffic Law* has been used as a whip to punish the petitioner for invoking the privilege instead of providing information to the police.

Inasmuch as *Boyd v. U.S.*; 116 U.S. 616 describes the Fourth and Fifth Amendments as "almost running in to each other," the reasoning of one of these protective Amendments would have applications to the other. In view of this Court's rejecting of a sanction or penalty imposed solely for the claim and exercise of the provisions of the Fourth Amendment *Sherar v. Cullen*, 481 F2d 945 1973, it appears consistent for this Court to reject a sanction or penalty solely for the exercise of the Fifth Amendment provision against compulsory self-incrimination.

*Section 1102 of the Vehicle and Traffic Law is a 2 point moving violation addressing the regulation of traffic. It fails to address either the Fifth Amendment or exhibiting a license. To find 1102 an appropriate charge for failing to exhibit a license when 507-2 specifically addresses failure to exhibit a license, would be to accuse the New York State legislature of a vain and useless act.

If ultimately a good faith defense is not permissible for having asserted the privilege, the claimant would be placed in a very tenuous position. Just as damages for error against the judiciary would destroy their independence, if allowed, penalties for error in claiming the privilege "if allowed" would destroy the unfettered choice of claiming the privilege.

Understandably, legal training and experience may indicate the claim of the privilege was in error and disclosures may be compelled. However, the privilege was not intended only for those with degrees in law or extensive legal experience, but rather for the average citizen. To expose the citizen to any penalty for exercising that which the law allows prior to a ruling by a Court, which in itself is subject to review, *Maness v. Meyers*, 419 U.S. 449, 1975, would subject the claimant to a risk which the claimant may have no legal training to assess.

REASON FOR GRANTING THIS WRIT

Granting this writ will enable the Court to declare the sufficiency of a good faith defense against any penalty or sanction for asserting the privilege against compulsory self-incrimination in lieu of making disclosures.

CONCLUSION

It may be that it* is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way namely by silent approaches to slight deviations from legal modes of procedure.

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

*\$25.00 fine

It is the duty of the Courts to be watchful for the constitutional rights of the citizen against any stealthy encroachment thereon. *Boyd supra*.

The good faith assertion of the privilege against compulsory self-incrimination cannot be converted into a wrongful act subject to a penalty or sanction.

Accordingly the petitioner's conviction of violating section 1102 of the New York State Vehicle and Traffic Law for asserting the privilege in lieu of making disclosures should be vacated.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on January 26, 1979 I served by U.S. mail postage paid three copies of the foregoing petition upon

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APPENDIX

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or other property proceeding for redress."

New York State Vehicle and Traffic Law**Section 507-2. Failure to exhibit license.**

Failure by a licensee to exhibit a license valid for operation under this chapter, not including any record of convictions stub to any magistrate, motor vehicle license examiner, motor vehicle inspector, peace officer or state policeman shall be presumptive evidence that he is not duly licensed.

Section 509-1. Except while operating a motor vehicle during the course of a road test conducted pursuant to the provisions of this article, no person shall operate or drive a motor vehicle upon any sidewalk or to or from any lot adjacent to a public garage, supermarket, shopping center, or car washing establishment or to or from or into a public garage or car washing establishment unless he is duly licensed pursuant to the provisions of this chapter.

Section 1102. No person shall fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic.